No. 84-701

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I. In its attempt to convince the Court that the government's position in this case would, in the words of the court of appeals, lead to federal regulation of "low lying backyards miles from a navigable waterway" (Pet. App. 21a), Riverside makes a number of factual misstatements and incomplete statements that require correction and clarification. We briefly address these matters before turning to Riverside's legal arguments.

A. First, Riverside asserts (Br. 4) that its property is "ringed on all four sides by paved public streets and fully developed urban areas." Preliminarily, we note that even if Riverside's assertion were correct, it would be irrelevant, because the presence of "man-made dikes or barriers" does not defeat the Corps' jurisdiction over wetlands adjacent to "waters of the United States."

33 C.F.R. 323.2(d). (We also note that many of the Great Lakes are "ringed on all sides by paved public streets," including interstate highways. Certainly, Riverside would not contend that this fact negates their status as "waters of the United States" under the Clean Water Act.) More important, however, is the fact that there is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. Black Creek in turn flows into Lake St. Clair, and that lake connects directly with the Great Lakes Erie (to the south) and Huron (to the north). Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes. This statement is documented by an aerial photograph and a topographic map of Riverside's property (PX 1 (J.A. 118); PX 23 (S. Ct. Exh. 4), reproduced in part at App., *infra*) that accurately reflect the true location of the four "paved public streets and fully developed urban areas."[1] As these exhibits demonstrate, the property touches paved streets on only two sides. The northern boundary of the property (*i.e.*, the boundary of the upland portion over which the Corps does not assert jurisdiction (see Gov't Br. 45)) abuts South River Road, which runs roughly parallel to the Clinton River. The western boundary of the property

[1] The exhibits in this case are in considerable disarray, apparently because the district court clerk's office misplaced them for a number of years. It is our understanding that they were never sent to the court of appeals, and that court appears to have decided the case without benefit of any of the exhibits. When the government requested the transfer of the exhibits to this Court, the district court clerk's office was unable to locate all of them, and thus this Court does not have all of the exhibits in the case. Additional confusion has been generated by the fact that the district court clerk's office renumbered the exhibits it did have before transmitting them to this Court. In some instances, it is not possible to determine the former exhibit number, thus making it difficult to correlate the trial testimony with particular exhibits. Where correlation is possible, we shall employ a parallel citation form, citing first to the original exhibit number at trial and, in parentheses, to the new number assigned to the exhibit in this Court.

runs along Jefferson Avenue. The southern portion of the property is, on the other hand, bounded not by a paved street but by more wetlands (see also Pet. App. 24a). The road south of those wetlands, the Metropolitan Parkway, is some 1300 feet south of Riverside's property. Finally, and of greatest significance, is the location of the north-south road to the east of Riverside's property, Venetian Drive. Between the eastern boundary of Riverside's property and that road lie some 3300 feet of additional wetlands. Moreover, at its southern terminus, Venetian Drive dead ends at Black Creek; it does not connect with the Metropolitan Parkway's eastern terminus. Stated differently, the "ring of paved public streets" is unmistakably broken, permitting direct access across Riverside's wetlands and wetlands owned by others to Black Creek through a sizeable outlet of open water (not merely a marsh) that does not require crossing "paved streets," man-made dikes or drains, or any other feature relied upon by Riverside to convey the impression that its property is unconnected to any navigable water.[2]

In any event, it is our view that the most informative exhibits are PX 1 and PX 23 (S. Ct. Exh. 4), and these exhibits are reproduced, respectively, at J.A. 118 and App., *infra*. PX 23 (S. Ct. Exh. 4) is a USGS topographic map of the quadrangle that includes Riverside's property; to make reproduction possible in this brief, we have cropped the map to delete those portions of the quadrangle that are quite distant from Riverside's property.

[2] PX 23 (S. Ct. Exh. 4) was made in 1968 and revised in 1973, with the revisions shown in purple (App., *infra*). The southern portion of Riverside's property, over which the Corps asserts jurisdic-

B. Riverside also asserts (Br. 4, 31) that its property was actively farmed for close to 60 years, or until 1955. In addition to the fact that historic use is irrelevant to a current determination of wetlands jurisdiction, the record citation that Riverside relies upon does not bear out its contention. The witness, who was 75 years old at the time of trial (1/21/77 Tr. 3), testified that he saw corn on the property when he was about 10 years old (*id.* at 6). Thereafter, he testified only that he and his father cut hay on the property during World War II (*id.* at 7); he did not testify to any other farming activity occurring at that time or at any subsequent time.[3] Although there is some evidence that row crops were cultivated on the property as late as 1940 (J.A. 31; 1/21/77 Tr. 99-101), the only "agricultural" activity on

tion, as well as the surrounding wetlands to the south and east, is dotted with the topographer's symbol for marshes. App., *infra;* 1/15/77 Tr. 167-168. Thus, Riverside's contention (Br. 31) that flood protection activities undertaken by the Corps in 1973 are responsible for creating the wetland conditions that now dominate its property is totally contradicted by the abundance of marsh symbols on the 1968 topographic map and the absence of any revisor's changes to the map in 1973. See also Gov't Br. 47-48 n.41. It is also worth noting that a USGS map prepared in 1952 (PX 22 (S. Ct. Exh. 17)) likewise shows marsh symbols all over the southern portion of Riverside's property (see also J.A. 43-44).

[3] Riverside also cites (Br. 4) to DX 25, 26, and 27, in support of its assertion that the property was actively farmed until at least 1955. Unfortunately, these exhibits are not available to the Court; they appear to be among the exhibits lost by the district court clerk's office. To the best of our knowledge, all three exhibits are Department of Agriculture aerial depictions of the property, one made in 1940 and the other two in 1955. Without the exhibits themselves, it is of course impossible to ascertain what they show about past uses of the property. We note, however, that there was testimony at trial that only DX 26, the 1940 depiction, suggested the possibility of farming activity. The quality of DX 25 and 27 (the 1955 depictions), on the other hand, was too poor to indicate what use was being made of the property (1/13/77 Tr. 51-52).

the property in the 1950s was the mowing of grass (J.A. 87; see also 1/21/77 60-61 (no agricultural use of the property since at least 1951)). To our knowledge, mowing grass does not constitute farming. In any event, farming, be it mowing grass, cutting hay, or more traditional agricultural activities, is not inconsistent with the status of the property as a wetland covered by Section 404. J.A. 37, 59-60. Indeed, the evidence shows that, notwithstanding the very limited farming activities in the distant past, the property has been a wetland since at least 1873 (J.A. 17-18; 1/15/77 Tr. 153-155) and has been consistently used for trapping and hunting muskrats and waterfowl and for spear fishing by bow and arrow (see, *e.g.*, J.A. 51-54, 64-71).

C. Riverside further asserts (Br. 4) that the portions of the property that were not farmed were heavily wooded by oak and maple trees that are still in existence today. Riverside's record citation for this contention is the confusing testimony of one witness that he observed one dead oak tree and another tree that may or may not have been an oak but had been pushed over by prior filling activities (Resp. Br. App. 3a-4a). In addition, the cited testimony suggests that the dead oak tree and the other unidentified tree were located on the upland portion of Riverside's property, over which the Corps does not assert jurisdiction. In any event, none of the maps and photographs in the record suggests that the property (with the possible exception of a very small area in the northern, upland portion) is heavily wooded. Finally, the maple trees on Riverside's property are a wetland species of vegetation. J.A. 33, 56.

D. Riverside also contends (Br. 31) that its property is partially developed with sidewalks, sewers, and fire hydrants. The only testimony in the record with respect to sidewalks is that of George Short, the sole owner of Riverside Bayview Homes, Inc., to the effect that sidewalks were "down on Macomber Street" when the

property was platted in 1916 (J.A. 85). Riverside neglects to point out, however, that Macomber Street runs only through the upland portion of its property not covered by Section 404 (see PX 23 (S. Ct. Exh. 4), App., *inf. a*); nothing in the record suggests that there are any sidewalks on the wetland portion of the property. With respect to sewers and fire hydrants, the record contains testimony that the filling operation that would be necessary for Riverside to carry out its development plans would bury the sewers and fire hydrants, thereby rendering them useless (see 1/17/77 Tr. 64 ("[I]f they filled this area, they would have to extend the fire hydrants and manhole covers up in the air.")). The record also contains testimony that the fire department has been unable to put out marsh fires on Riverside's property because the area was too muddy for the fire trucks to enter (1/21/77 Tr. 61-63).

E. In short, as we explained in our opening brief (at 44-48), the southern portion of Riverside's property has exhibited the wetland characteristics of aquatic vegetation and saturated (sometimes flooded) conditions for decades (J.A. 56, 64-65, 70; 1/15/77 Tr. 59), and the visual evidence before this Court (J.A. 118; App., *infra*) demonstrates beyond cavil that the property is adjacent to navigable waters of the United States. Riverside's contention that its property is nothing more than an "unconnected low-lying area[ ]" (Br. 38) is totally contradicted by the evidence of record.

II. A. Riverside contends (Br. 22) that the term "navigable waters" as used in the Clean Water Act refers only to "the navigable waters of the United States, non-navigable portions of those waters and tributaries." According to Riverside (*ibid.*), the only "wetlands" that Congress intended to regulate under the CWA are those that "constitut[e] part of the foregoing waterbodies." Reduced to its essentials, Riverside's

argument amounts to a contention that Congress did not intend to regulate adjacent wetlands at all, because such wetlands, by definition, are not part of any of the enumerated water bodies, but are instead the marshes, swamps, and bogs *adjacent* to those water bodies.[4] In light of the legislative history of the 1977 amendments to the CWA, this contention is untenable (see Gov't Br. 22-27 and pages 13-14, *infra*).

Riverside's confusion clearly stems from its erroneous assumption (Br. 16-22) that those waters subject to federal regulatory control under the Commerce Clause are the same as, and no broader than, those waters subject to federal regulation for the purpose of protecting or improving navigation. But this Court has clearly recognized that the limits of Congress's Commerce Clause powers are in no way circumscribed by factors relating to navigation. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171-174 (1979). As the Court there stated (*id.* at 174 (emphasis added)), "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause *irrespective of whether navigation, or, indeed, water, is involved.*" In this case, therefore, Riverside's reference to the waters regulated by the United States for purposes of navigation sheds no light on congressional intent with respect to the areas—be they traditional waters or wetlands—

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[4] Although the Section 404 program also encompasses "isolated" wetlands, *i.e.*, wetlands such as prairie potholes (see *North Dakota* v. *United States*, 460 U.S. 300, 304 n.4 (1983)), the regulatory standards for the Corps' assertion of jurisdiction over isolated wetlands differ from those applicable to adjacent wetlands. See 33 C.F.R. 323.2(a)(2), (3), and (7). This case, however, does not involve the regulation of "isolated" wetlands; instead, the Corps asserts jurisdiction over Riverside's property on the basis of its "adjacency," or geographic proximity, to open water bodies. See pages 10-11, *infra*.

that Congress intended to regulate when exercising its Commerce Clause powers to their "constitutional limit" (see, *e.g.*, 118 Cong. Rec. 33699 (1972); S. Rep. 95-370; 95th Cong., 1st Sess. 75 (1977)). Indeed, one would have to make the wholly unwarranted and truly fanciful assumption that Congress was unaware of the broad sweep of its regulatory powers under the Commerce Clause in order to accept Riverside's contention that Congress believed the full extent of its constitutional power over water was in any way circumscribed by the interests of navigation.

Moreover, conspicuously absent from Riverside's enumeration of the waters it believes Congress intended to regulate is any attempt to correlate those waters with the purposes of the Clean Water Act. It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g.*, *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983). As we demonstrated in our opening brief (at 19-27, 33-39), the Corps' definition of wetlands, which attaches no significance to the source of water inundating or saturating an area characterized by wetlands vegetation, is fully consistent with both congressional and scientific understanding of the many valuable services performed by wetlands. See also *id.* at 25 n.17.

Riverside's only response to these concerns is to argue that the government is seeking "to expand the CWA into the equivalent of a national wetlands preservation act" (Br. 42). But the legislative history of the 1977 amendments to the CWA unequivocally demonstrates congressional recognition of the importance of wetlands. Congress clearly understood that wetlands adjacent to large areas of open water such as Lake St. Clair perform vital hydrologic support functions in the aquatic ecosystem, including natural drainage, organic

and mineral nutrient exchange, sedimentation control, flushing, water purification, provision of diverse fish and waterfowl habitat required for all stages of life cycles, water current control, and flood water storage. See, *e.g.*, 123 Cong. Rec. 26697 (1977) (remarks of Sen. Muskie); *id.* at 26718-26719 (remarks of Sen. Baker); Institute for Water Resources, U.S. Army Corps of Engineers, *Research Report 79-R1, Wetland Values—Concepts and Methods for Wetlands Evaluation* (1979) [hereinafter cited as *Wetland Values*]. And to the extent that federal regulation of wetlands may produce an incidental effect on local land use decisions (see Resp. Br. 43), that result is merely a necessary by-product of Congress's decision to control discharges into waters of the United States, including wetlands. It no more invades the province of the states than does implementation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283-293 (1981). [5]

[5] Riverside's additional argument (Br. 43-44 & n.46) that Congress intended federal jurisdiction over wetlands to be construed narrowly because it wanted to leave wetland regulation entirely to the states is all the more unsound in light of Section 404(g)(1) of the CWA, 33 U.S.C. 1344(g)(1). In that Section, Congress expressly specified the maximum extent to which it was willing to empower the States to administer the Section 404 program, including wetland regulation. Judicial creation of a greater role for the states would completely rewrite the statute. (We note that the decision of 20 states, including Michigan, to support the United States in this case as amici curiae further belies Riverside's argument.)

Finally, the fact that wetlands may be adversely affected by activities not regulated under Section 404 and the existence of other federal programs that provide different types of protection for wetlands than does Section 404 (see Resp. Br. 45) do not support Riverside's argument for a narrow construction of Section 404. Riverside cites no authority for the proposition that Congress must address every facet of wetlands protection in a single statute; indeed, the existence of multiple statutes dealing with wetlands only underscores the importance that Congress attaches to their protection.

B. Riverside and its amici argue that the court of appeals' "frequent flooding" test will ensure the presence of a "hydrologic connection" between traditional water bodies and those adjacent wetlands that Congress may have intended to regulate under Section 404. This is true enough, but it should be obvious that "frequent flooding," which was never mentioned in the legislative history of the 1972 Act or the 1977 amendments and is nowhere to be found in the Corps' regulations, is not the only means by which to establish such a "hydrologic connection."

Although we disagree with the extremely narrow concept of "hydrologic connection" espoused by Riverside and its amici, we do not take serious issue with the proposition that wetlands, to be considered "adjacent" to a water body (see 33 C.F.R. 323.2(d)), should have some functional relationship with the water body. But that relationship may take any number of forms, including "frequent flooding," a visible surface water connection, a ground water connection, or, more generally but equally pertinent, an areal relationship that recognizes the interrelated nature of all waters, including wetlands, in a single aquatic ecosystem. *Wetland Values* 26-27. (By a single aquatic ecosystem, we mean all waters, including wetlands, within a geographically proximate hydrologic regime that support interrelated and interacting communities of plants or animals (see 40 C.F.R. 230.3(c)).

Precise quantification of the relationships within an aquatic ecosystem and the relative importance of particular wetlands requires highly sophisticated techniques and instruments beyond the scope of most threshold jurisdictional inquiries conducted by the Corps. *Wetland Values* 26. See also Fish & Wildlife Service, U.S. Dep't of the Interior, *Classification of Wetlands and Deepwater Habitats of the United States*

23 (1979) (technical data describing hydrologic characteristics of water regimes, including wetlands, is seldom available). Accordingly, the Corps invokes the concept of "adjacency" as a regulatory tool to identify waters in the same aquatic ecosystem; stated differently, the Corps employs a sort of administrative presumption that a wetland in close geographic proximity to an open water body affects interstate commerce by virtue of its relationship to that water body and is therefore within the class of wetlands that Congress intended to regulate. On the other hand, no such presumption attaches in the case of "isolated" waters, including wetlands; in such cases, the Corps assumes the case-by-case burden of demonstrating that the use, degradation, or destruction of isolated waters, including wetlands, could affect interstate commerce (33 C.F.R. 323.2(a)(3)).

The regulatory classification of wetlands into the categories of "adjacent" and "isolated" is an essential tool for the effective implementation of the statute. As noted, establishing a hydrologic connection is often a time-consuming and expensive process.[6] Were the

[6] Riverside takes issue (Br. 32-33) with our position (Gov't Br. 40-44) that an easily-applied threshold test for Section 404 jurisdiction benefits both landowners and regulators alike, contending that wetlands determinations are inherently difficult and that satisfying the court of appeals' "frequent flooding" requirement therefore adds nothing to the complexity of a wetlands determination. In fact, however, the Corps' draft manual, U.S. Corps of Engineers, Dep't of the Army, *Wetlands Delineation Manual, Doc. No. Y-84* (Draft 1985) (upon which Riverside relies for its claim of complexity), has not been officially adopted by the Corps, does not even address the issue of hydrologic connections, and, more importantly, states that "[i]n most cases, the combination of available office data and relatively simple, rapidly applied, onsite methods will be sufficient" to make a wetlands determination. *Id.* at 48. These methods "usually [do] not require collection of quantitative data" of the sort that so perplexed the district court (See Pet. App. 25a-31a). *Delineation Manual* at 112.

Corps forced to abandon the logical presumption inherent in the adjacency test at the threshold jurisdictional stage, many wetlands that Congress intended to regulate could be destroyed before the Corps had an opportunity to evaluate the impact of a particular proposal during the permit review process. In this case, for example, Riverside refused to comply with a cease and desist order issued by the Corps, and the United States was forced to seek a temporary restraining order and a preliminary injunction to halt Riverside's fill operation until the Corps could evaluate Riverside's proposal.[7] In this and other enforcement actions, refusal to permit the Corps to engage in a presumption of a hydrologic association and an interstate commerce nexus based on adjacency clearly would thwart Congress's goals.

The Corps recognizes, however, that not every wetland performs equally important environmental functions. Even "adjacent" wetlands vary in their environmental significance, depending on a number of variables. *E.g.*, *Wetland Values* 27. These variables are fully considered in the permit review process (see, *e.g.*, 40 C.F.R. 230.6(a), 230.10(b)-(d), 230.11). To require their consideration and definitive resolution earlier, at the threshold jurisdictional stage, would, as noted,

[7] Riverside complains (Br. 32) that the permit review process itself is burdensome and time-consuming. Riverside's own case, however, which began with the submission of an incomplete application, is not typical. The Corps advises us that the average time for processing permit applications is currently 70 days. Nevertheless, burdens on individual permit applicants are of concern to the Corps, and, pursuant to 33 U.S.C. 1344(q), the Corps has adopted various measures to streamline interagency review of permit applications. Finally, a substantial number of actions that would otherwise require individual Section 404 permit applications are instead automatically authorized by "general" permits issued by regulation. See 33 U.S.C. 1344(e)(1); 33 C.F.R. Pt. 330.

result in the unwarranted degradation or destruction of many environmentally significant wetlands. Accordingly, the Corps' "adjacency" regulation, as broadly defined above in accordance with sound scientific principles, should be upheld as a reasonable administrative approach to Riverside's "hydrologic connection" argument.[8]

C. As we demonstrated in our opening brief (at 22-25), Congress in 1977 clearly ratified the Corps' interpretation of its jurisdiction under Section 404. While Riverside correctly notes (Br. 35-36) that Congress was dissatisfied with certain aspects of the Corps' Section 404 program, it ignores the fact that Congress engaged in a comprehensive reexamination of every facet of that

[8] It is important to note that the outer limits of what may properly constitute a "hydrologic connection" need not be defined in this case. The maps and photographs of record (PX 1 (J.A. 118); PX 23 (S. Ct. Exh. 4), App., *infra*) clearly demonstrate an open water connection between Riverside's marsh and the navigable waters of Black Creek. Using any sensible approach to the problem, this connection clearly satisfies the "hydrologic connection" requirement urged by Riverside. Moreover, the district court's finding that there was no hydrologic connection between Riverside's property and the adjacent water bodies (Pet. App. 32a-37a) clearly referred *only* to the absence of a *subsurface* flow from the adjacent water bodies to Riverside's property. Whether or not this finding is clearly erroneous (as we suspect it is) is irrelevant in the face of the visible surface water connection. See also Gov't Br. 8 n.7.

Finally, it should be noted that the Corps has discarded proposed regulations (48 Fed. Reg. 21474 (1983)) that would have amended the definition of "adjacent" to require, in addition to geographic proximity, "a reasonably perceptable [*sic*] surface or subsurface hydrologic connection to a water of the United States." The proposal was abandoned in the face of adverse comments, particularly from EPA (which bears ultimate administrative responsibility for defining "waters of the United States"). The commentors feared that the Corps' proposal would be read too narrowly, so as to exclude from the "hydrologic connection" concept those geographically proximate wetlands that perform the functions of concern to Congress even in the absence of a readily-ascertainable surface or subsurface connection to open water bodies.

program and decided to cure the objectionable features by exempting specific *activities* from Section 404's permit requirements; on the other hand, Congress expressly declined to adopt an amendment to limit the Corps' interpretation of the *geographic* reach of Section 404. Congress understood exactly what it was doing (cf. *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 7-12); it unequivocally rejected the interpretation urged by Riverside. Contrary to Riverside's argument (Br. 36), therefore, this case does not involve an ordinary claim of legislative acquiescence through silence, nor is it simply a case of reliance on post-enactment remarks by individual legislators.[9]

D. As we have demonstrated here and in our opening brief, the Corps' regulations reasonably interpret congressional intent, and the court of appeals erred in substituting its own construction of the statute and the regulations for that of the agency. Riverside's response is to argue (Br. 29) that no deference is due the Corps' interpretation because it has not been consistent. Notably, Riverside never acknowledges that the ultimate administrative responsibility for defining

[9] Equally without merit is Riverside's suggestion (Br. 36-37 n.39) that congressional ratification of the Corps' program, if any, was limited to the Corps' 1975 interim final regulations and did not encompass the final regulations promulgated in 1977. The 1977 regulations were promulgated before the pertinent legislative debates, and Congress was aware of those regulations (see, *e.g.*, Gov't Br. 24). In any event, Riverside erroneously argues (Br. 37 n.39) that the 1975 regulations encompassed only those freshwater wetlands created by periodic inundation from a contiguous or adjacent navigable water. This interpretation is not traceable to the 1975 regulatory language, and the 1975 regulations were never so construed by the Corps. As with the 1977 regulations, the Corps' position was that the source of water—be it overflow from adjacent water bodies, rainwater, ground water, or storm water runoff—was irrelevant. See Affidavit of William N. Hedeman, Jr. (Dist. Ct. Docket Entry No. 14).

"waters of the United States" rests with EPA (see Gov't Br. 18 n.11), and that agency has demonstrated unwavering consistency in its interpretation and implementation of the CWA. Moreover, the only "inconsistency" on the part of the Corps was rectified in response to the order in *NRDC* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (see Gov't Br. 5-6); since that time, the Corps has never deviated from the interpretation of the CWA it advances in this Court. Indeed, it is only by blinding itself to any distinction between proposed regulations and duly promulgated final regulations that Riverside is able to advance its claim of "inconsistency" on the part of the Corps. But the notion that an agency's interpretation of a statute is undeserving of deference whenever it makes changes to proposed rules undermines the very purpose of notice and comment rulemaking. In any event, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 25.

III. Finally, Riverside argues (Br. 41, 46-50) that if the CWA *does* permit the regulation of "adjacent wetlands" as defined by the Corps, then the Act is an unconstitutional delegation of legislative functions and violates the Takings Clause of the Fifth Amendment. Neither contention has any merit.[10]

A. Congress may constitutionally delegate to an administrative agency the responsibility for effectuating

[10] Riverside never raised the delegation argument in the lower courts, and those courts had no occasion to pass on it. Accordingly, this Court should decline to consider the issue. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 16-17.

legislative policy so long as it sets general standards sufficient to provide the agency with an intelligible principle for guidance. See, *e.g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976); *Carlson* v. *Landon*, 342 U.S. 524, 542-544 (1952). Congress's delegation of authority to the Corps (and the EPA) under the CWA easily satisfies this test. *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 916 (5th Cir. 1983).

In determining whether Congress has provided sufficient standards, it is appropriate to look to statutory context and legislative history to add gloss to a broad grant of legislative authority. See *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 675-676 (1980) (Rehnquist, J., concurring). The stated goals of the CWA (restoration of the integrity of the Nation's waters and elimination of discharges of pollutants into those waters, 33 U.S.C. 1251(a)), the legislative history's guidance that "waters of the United States" be construed to the constitutional limit to accomplish those goals, and the 1977 legislative history relating specifically to Section 404 collectively provide an intelligible standard to guide the Corps' assertion of regulatory jurisdiction.[11] This Court has recognized

[11] The Corps' promulgation of regulations defining "waters of the United States" does not warrant the conclusion that an unconstitutional delegation has occurred. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron U.S.A. Inc.* v. *NRDC*, slip op. 5 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). Furthermore, it is immaterial that such gap-filling regulations clarify a term that determines jurisdiction under the Act. See *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303-304 (1977); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944).

With respect to the Corps' authority to grant or deny permits, which Riverside also suggests (Br. 41) is an unconstitutional

that " '[n]ecessity . . . fixes a point beyond which it is unreasonable and impractical to compel Congress to prescribe detailed rules.' " *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. at 560 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The specificity demanded by Riverside would exceed that point, and its delegation argument should be rejected.

B. Riverside's argument that the Corps' assertion of regulatory jurisdiction over wetlands of the type found on its property amounts to an unconstitutional taking of private property reflects a failure to distinguish between the mere assertion of regulatory jurisdiction over wetlands and the decision to grant or deny a permit. This Court recently reaffirmed the principle that taking claims are premature until a landowner receives a final decision regarding how or whether he will be permitted to develop his property. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 17. The Court also reaffirmed the principle that taking claims against the federal government are premature until the landowner has availed himself of the process for seeking just compensation provided by the Tucker Act, 28 U.S.C. 1491. *Williamson County*, slip op. 20-21. Riverside has not done so.

Accordingly, the proposition (Resp. Br. 16, 50) that a statute susceptible to more than one interpretation should be construed so as to avoid a taking of private property is inapposite here. In *United States* v. *Security Industrial Bank*, 459 U.S. 70, 77-78, 82 (1982), the Court concluded that Congress did not intend to apply a provision of the Bankruptcy Code retroactively in part because, if it were so applied, the statute would effect a

delegation of legislative power, the CWA sets forth quite specific criteria. See 33 U.S.C. 1344(b); 33 U.S.C. 1343; *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 916; Gov't Br. 21 n.12.

taking *on its face* for *private* purposes. Here, on the other hand, the assertion of CWA jurisdiction merely triggers a permit requirement for certain polluting activities, not a taking of any property right.

In an attempt to overcome the problems with its taking argument, Riverside asserts (Br. 48) that a determination of wetlands jurisdiction is invariably tantamount to a permit denial.[12] Riverside grossly misrepresents reality by its claim (Br. 49) that "[t]he criteria contained in the Corps' regulations relative to the granting of a permit in a wetland area assure that a permit will be denied."[13] Riverside apparently bases this misstatement on its erroneous assumption (Br. 48) that the Section 404 regulations effectively require the

[12] At the same time, Riverside recognizes (Br. 49), as it must, that the determination whether a permit denial amounts to a taking requires a factual inquiry. Thus, Riverside's taking argument must be rejected for the additional reason that it can point to no evidence supporting its assertion (*ibid.*) that without a permit there is no alternative economic use of its property; there simply was no inquiry in the courts below into possible alternative uses of Riverside's property. Riverside's assertions (Br. 47-48) that the only use for the wetlands portion of its property is as a housing subdivision and that agricultural use is neither economically viable nor compatible with the site improvements (*i.e.*, the sewers and fire hydrants discussed at pages 5-6, *supra*) are totally without record support.

[13] In fact, only a small number—approximately 2.7%—of all Section 404 permit applications are denied. Office of Technology Assessment, Congress of the United States, *OTA-0-206, Wetlands: Their Use and Regulation* 143-144 (1984). The Corps grants 50% of Section 404 permit applications without significant modification, and 33% are granted with substantial modifications intended to reduce adverse project impacts. *Id.* at 12. In 1980-1981, the Corps authorized projects that resulted in the conversion to other uses of about 50% of the wetlands acreage for which permits were sought. *Id.* at 11, 144-145.

denial of a permit for any project that does not need to be located in, or in close proximity to, the aquatic environment.

In fact, an applicant for a nonwater-dependent activity covered by Section 404 may instead show a lack of environmentally preferable practicable alternatives (33 C.F.R. 320.4(b)(4); 40 C.F.R. 230.10(a)); the showing required is inversely related to the degree of potential adverse impact from a proposed activity (see 40 C.F.R. 230.6(a)). Although a permit application for a nonwater-dependent activity necessitates a more persuasive showing regarding the lack of alternatives than does an application for a water-dependent activity, this distinction imposes only a heightened factual burden. For example, in *Louisiana Wildlife Federation* v. *York*, 761 F. 2d 1044, 1047-1048 (5th Cir. 1985), the court of appeals approved the Corps' issuance of permits allowing the conversion of 5,200 acres of wetlands to agricultural use (a nonwater-dependent activity), notwithstanding a claim that the permit applicants had failed to make the necessary showing concerning the lack of alternatives. The court held that under the Corps' regulations and EPA's guidelines, the Corps was permitted, and indeed had the duty, to consider the objectives of the project and the economic feasibility and logistics of alternatives. 761 F.2d at 1048. See also *Hough* v. *Marsh*, 557 F. Supp. 74, 83 (D. Mass. 1982) (finding of water dependency is not a prerequisite to filling wetlands under Section 404, but it is a factor to be considered in the application process). On this record, therefore, there is no support for Riverside's argument that the mere assertion of regulatory jurisdiction amounts to a taking.

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

APPENDIX

MT. CLEMENS EAST, MICH.

SE 4 MT CLEMENS 15 QUADRANGLE

N4230—W8245/7.5

1968

AMS 4469 III SE—SERIES V862

QUADRANGLE LOCATION

Mapped, edited, and published by the Geological Survey
in cooperation with State of Michigan agencies

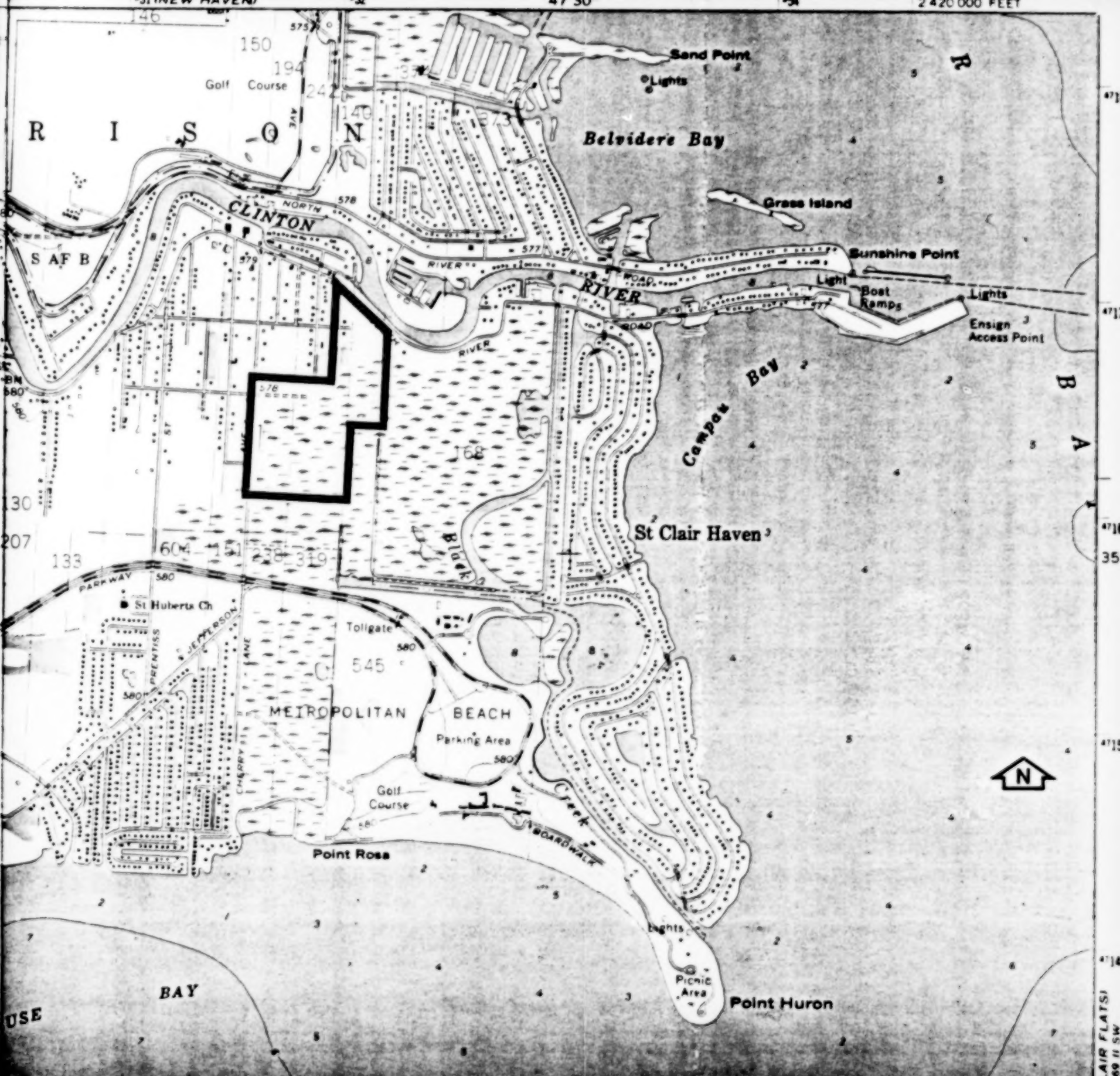
Control by USGS, USC&GS, and U. S. Lake Survey

Planimetry by photogrammetric methods from aerial photographs taken 1951. Topography by planetable surveys 1952. Revised from aerial photographs taken 1967. Field checked 1968

SCALE 1:24 000

CONTOUR INTERVAL 5 FEET
DATUM IS MEAN SEA LEVEL

Property Boundary


Golf Course
R I S O N
SAFB
CLINTON
NORTH
RIVER
ROAD
Sand Point
Lights
Belvidere Bay
Grass Island
Sunshine Point
Light
Boat Ramps
Lights
Ensign Access Point
Compass Bay
St Clair Haven
St Huberts Ch
Tollgate
JEFFERSON
PRENTISS
CHERRY LANE
METROPOLITAN BEACH
Parking Area
Golf Course
Creek
BOARDWALK
Point Rosa
Lights
Picnic Area
Point Huron
BAY
USE
N